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SIEW YAW JEN v. MAJLIS PERBANDARAN KAJANG & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ALIZATUL KHAIR OSMAN JCA
B ANANTHAM KASINATHER JCA
[CIVIL APPEALS NO: W-01(NCVC)(W)-163-04-2013
& W-02(NCVC)(W)-804-04-2013]
13 FEBRUARY 2014

C ***LIMITATION:*** *Negligence – When cause of action in tort accrued – Local council issued certificate of fitness for occupation ('CFO') upon inspections – Allegation of non-compliance with infrastructure plan – Whether cause of action arose on date of issuance of CFO – Whether action barred by limitation*

D ***TORT:*** *Negligence – Duty of care – Allegation of non-compliance with infrastructure plan – Local council took remedial actions and incurred expense upon developer's refusal – Whether developer's act or omission caused damages or losses to residents at project – Whether developer's refusal could form basis of negligence*

TORT: *Waiver of tort – Acceptance of alternative remedy – Local council issued*
E *certificate of fitness for occupation ('CFO') upon inspections – Failure of developer to construct retaining walls – Developer built earth slope – Whether accepted as adequate alternative – Whether local council waived requirement for construction of retaining walls by issuance of CFO*

The appellants were the first and second defendants in the High Court.
F Karunmas Ehsan Sdn Bhd, the first defendant, was the registered proprietor of a parcel of land ('Lot 6504') and the developer of a project known as Taman Desa Karunmas ('the project'). Siew Yaw Jen, the second defendant, was one of the consulting engineers for the first defendant and was responsible for the project. Lot 6504 and the project were situated within the
G local authority area under the administration of the respondent, Majlis Perbandaran Kajang ('the plaintiff'). The first defendant had lodged the infrastructure plan for the project which was duly approved by the plaintiff. According to the infrastructure plan, the first defendant was required to construct a Nehemiah reinforced soil wall and bored pile wall ('retaining
H walls') along the slope throughout the boundary of Lot 6504 with the adjacent lot. The second defendant signed 'Borang Pengesahan Jurutera' ('PJ Form') and civil works structures had been constructed by the first defendant in accordance with the infrastructure plan. Based upon the PJ Form, the plaintiff issued a certificate of fitness for occupation ('CFO') for the project on or around 28 December 2001. Subsequently, soil erosion and landslides
I occurred on the slope and the plaintiff claimed that the first defendant did

not in fact build the retaining walls. The plaintiff claimed that the defendants were guilty of fraud in submitting the PJ Form when the retaining walls were not in fact built. The plaintiff also claimed, alternatively, that the defendants were guilty of negligence when they failed to build the retaining walls in accordance with the infrastructure plan. The plaintiff therefore demanded that the first defendant carry out remedial works and build the retaining walls. The first defendant however denied that it had the obligation to do so. The High Court allowed the plaintiff's claim against the defendants and therefore, the defendants appealed. The issues to be considered by the court were: (i) whether the plaintiff's action was barred by limitation; (ii) whether the first defendant's refusal to construct the retaining walls constituted the tort of negligence as against the plaintiff; and (iii) whether the plaintiff was estopped from claiming the reliefs claimed in the action.

Held (allowing appeals)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) The plaintiff was not relying on any statutory provisions as a foundation of its claims and therefore its claims remained claims in tort. The plaintiff had conducted two site inspections through its representatives, well before the CFO was issued. The letter signed by the then head of the plaintiff's Infrastructure and Development Department ('the Department') stated that the site inspection was conducted and the Department supported the issuance of the CFO. (paras 20-22)

(2) If there had been any non-compliance with the infrastructure plan or with any other infrastructure requirements, that would stand in the way of the CFO being issued, and the non-compliance would have been obvious from the two site inspections. By the time the CFO was issued, the plaintiff should have known from the site inspections that the retaining walls had not been built and thus known of the alleged misrepresentation in the PJ Form. Hence, the cause of action had arisen by the date of the issuance of the CFO on 12 December 2001, if not earlier. Therefore, by 27 December 2007, the plaintiff's action for the defendants' alleged tortious actions/omissions would have been barred by limitation. (paras 26, 27 & 30)

(3) The tort of negligence requires duty of care on the part of the plaintiff not to do any act or omit to do any act the doing of which or the omission of which could foreseeably affect other persons resulting in damage or loss to such other persons. The first defendant owed a duty of care to the persons affected by its neglect/refusal to build the retaining walls, particularly after the erosion occurred. The persons, quite obviously, would be the residents residing near or in the vicinity of the slope such that if the slope failed or became destabilised, they would

foreseeably be adversely affected. However, the plaintiff's complaint was that when the first defendant refused to take action to construct the retaining walls, the plaintiff had to take remedial actions when there was erosion on and of the slope and as a result incurred expense. Hence, the first defendant's refusal to construct the retaining walls after the plaintiff demanded it could not form the basis of negligence. (paras 28, 36, 37 & 39)

(4) Further, after having pleaded gross negligence, the plaintiff went on to state that as the local authority in which the first defendant's project was situated, it had a duty to ensure the safety and protect the interest of the residents in the project 'dan adalah berkewajipan untuk memulakan tindakan ini terhadap defendan-defendan bagi kepentingan awam'. Therefore, it could not, in fact and in law, be a claim founded on the tort of negligence. (para 40 & 41)

(5) At the time of the inspections, it would have been obvious to the plaintiff's agents performing the inspections that the first defendant had built an earth slope which consisted of 'close turf surface inclusive of berm and cascading drain'. The earth slope certainly was not the retaining walls indicated on the infrastructure plan. There was also no evidence that the CFO that was granted was a conditional CFO. When an earth slope was built and CFO granted after two inspections, the plaintiff had clearly accepted that the earth slope was an acceptable replacement for the retaining walls. (para 43, 45 & 46)

(6) There was ample evidence before the High Court to show that the plaintiff knew the constraints faced by the first defendant in relation to the construction of the retaining walls and accepted that an earth slope was an adequate alternative, and hence proceeded to grant the CFO. Therefore, the plaintiff was clearly estopped from now claiming the reliefs claimed in this action. (para 62 & 63)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu adalah defendan-defendan pertama dan kedua di Mahkamah Tinggi. Karunmas Ehsan Sdn Bhd, defendan pertama, adalah pemilik berdaftar sebidang tanah ('Lot 6504') dan pemaju projek yang dikenali sebagai Taman Desa Karunmas ('projek tersebut'). Siew Yaw Jen, defendan kedua, adalah salah seorang jurutera perunding dengan defendan pertama dan bertanggungjawab bagi projek tersebut. Lot 6504 dan projek tersebut terletak dalam kawasan pihak berkuasa tempatan di bawah pentadbiran responden, Majlis Perbandaran Kajang ('plaintif'). Defendan pertama telah mengemukakan pelan infrastruktur bagi projek tersebut yang telah diluluskan oleh plaintif. Berdasarkan pelan infrastruktur tersebut, defendan pertama perlu membina dinding penahan tanah Nehemiah dan dinding cerucuk

tergerek ('dinding penahan') di sepanjang cerun dalam sempadan Lot 6504 dengan lot bersebelahan. Defendan kedua menandatangani Borang Pengesahan Jurutera ('Borang PJ') dan kerja-kerja struktur sivil telah dijalankan oleh defendan pertama menurut pelan infrastruktur. Berdasarkan Borang PJ, plaintif telah mengeluarkan sijil kelayakan menduduki ('CFO') bagi projek tersebut pada atau sekitar 28 Disember 2001. Kemudian, hakisan tanah dan tanah runtuh berlaku di atas cerun dan plaintif mendakwa bahawa defendan pertama sebenarnya tidak membina dinding penahan. Plaintif menyatakan bahawa defendan-defendan bersalah atas penipuan kerana mengemukakan Borang PJ apabila dinding penahan tidak dibina. Plaintif juga menyatakan, secara alternatifnya, bahawa defendan-defendan bersalah bagi kecuaian apabila mereka gagal membina dinding penahan menurut pelan infrastruktur. Plaintif, oleh itu, menuntut defendan pertama menjalankan kerja-kerja pembetulan dan membina dinding penahan tersebut. Defendan pertama walau bagaimanapun menafikan ia berkewajipan untuk berbuat demikian. Mahkamah Tinggi membenarkan tuntutan plaintif terhadap defendan-defendan dan oleh itu defendan-defendan merayu. Isu-isu untuk dipertimbangkan oleh mahkamah adalah: (i) sama ada tindakan plaintif terhalang oleh had masa; (ii) sama ada keengganan defendan pertama untuk membina dinding penahan membentuk tort kecuaian terhadap plaintif; dan (iii) sama ada plaintif diestop daripada menuntut relif-relif yang dituntut dalam tindakan tersebut.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Plaintif tidak bersandarkan kepada apa-apa peruntukan statutori sebagai asas tuntutan-tuntutannya dan oleh itu tuntutan-tuntutannya kekal dalam tort. Plaintif telah menjalankan dua pemeriksaan kawasan melalui wakilnya, sebelum CFO dikeluarkan. Surat yang ditandatangani oleh ketua Jabatan Infrastruktur dan Pembangunan plaintif ('Jabatan tersebut') menyatakan bahawa pemeriksaan kawasan telah dilakukan dan Jabatan tersebut menyokong pengeluaran CFO.

(2) Jika terdapat apa-apa ketidakpatuhan dengan pelan infrastruktur atau dengan apa-apa keperluan infrastruktur yang lain, ia akan menghalang pengeluaran CFO, dan ketidakpatuhan tersebut akan jelas daripada kedua-dua pemeriksaan tersebut. Pada masa CFO dikeluarkan, plaintif sepatutnya mengetahui daripada pemeriksaan kawasan bahawa dinding penahan tidak dibina dan oleh itu mengetahui tentang salah representasi dalam Borang PJ yang didakwa. Oleh itu, kausa tindakan telah timbul sebelum pengeluaran CFO pada 12 Disember 2001, jika tidak sebelumnya. Oleh itu pada 27 Disember 2007, tindakan plaintif terhadap tindakan/peninggalan secara cuai oleh defendan-defendan seperti yang didakwa adalah terhalang oleh had masa.

(3) Tort kecuaian memerlukan kewajipan berjaga-jaga pada pihak plaintif untuk tidak melakukan apa-apa tindakan atau peninggalan untuk melakukan sesuatu tindakan yang mana perlakuannya atau peninggalanya boleh diramalkan akan menjejaskan orang lain yang akan mengakibatkan kerugian atau kerosakan kepada orang tersebut. Defendan pertama mempunyai kewajipan berjaga-jaga kepada orang-orang yang terjejas oleh kecuaian/keengganannya untuk membina dinding penahan, khususnya selepas berlaku hakisan. Orang tersebut, jelas, adalah penduduk-penduduk yang tinggal berhampiran atau berdekatan dengan cerun tersebut di mana jika cerun tersebut runtuh atau menjadi tidak stabil, mereka diramalkan akan terjejas. Walau bagaimanapun, aduan plaintif adalah bahawa apabila defendan pertama enggan mengambil tindakan untuk membina dinding penahan tersebut, plaintif terpaksa mengambil tindakan pembetulan apabila terdapat hakisan pada dan terhadap cerun tersebut dan akibatnya menelan belanja. Oleh itu, keengganan defendan pertama untuk membina dinding penahan selepas plaintif menuntutnya tidak boleh membentuk asas kecuaian.

(4) Selepas memplidkan kecuaian yang melampau, plaintif meneruskan dengan menyatakan bahawa sebagai pihak berkuasa tempatan di mana projek defendan pertama terletak, ia berkewajipan untuk memastikan keselamatan dan melindungi kepentingan penduduk-penduduk di projek tersebut 'dan adalah berkewajipan untuk memulakan tindakan ini terhadap defendan-defendan bagi kepentingan awam'. Oleh itu, dari segi fakta dan undang-undang, tidak wujud tuntutan yang berasaskan tort kecuaian.

(5) Pada masa pemeriksaan, ia seharusnya jelas kepada ejen-ejen plaintif yang melaksanakan pemeriksaan bahawa defendan pertama telah membina cerun tanah yang membentuk 'close turf surface inclusive of berm and cascading drain'. Cerun tanah tersebut sememangnya bukan dinding penahan yang dinyatakan dalam pelan infrastruktur. Juga tiada keterangan bahawa CFO yang diberikan adalah CFO yang bersyarat. Apabila cerun tanah dibina dan CFO diberikan selepas dua pemeriksaan, plaintif jelas telah menerima bahawa cerun tanah tersebut adalah pengganti dinding penahan yang boleh diterima.

(6) Terdapat banyak keterangan di Mahkamah Tinggi untuk menunjukkan bahawa plaintif mengetahui tentang kesusahan yang dialami oleh defendan pertama berkaitan dengan pembinaan dinding penahan dan menerima bahawa cerun tanah tersebut adalah alternatif yang mencukupi dan oleh itu meneruskan untuk mengeluarkan CFO. Oleh demikian, plaintif jelas diestop daripada menuntut relif-relif yang dituntut dalam tindakan ini.

Case(s) referred to:
Donoghue v. Stevenson [1932] AC 562 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6

(Civil Appeal No: W-01(NCVC)(W)-163-04-2013)
For the appellant - D Paramalingam (M Sujata with him); M/s M Sujata & Assocs
For the respondent - Stella Ng; M/s Stella, Lim & Co

(Civil Appeal No: W-02(NCVC)(W)-804-04-2013)
For the appellant - Tan Yew Chuan; M/s Lee & YC Tan
For the respondent - Stella Ng; M/s Stella, Lim & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 21NCVC-189-09-2011]

Reported by S Barathi

JUDGMENT

Zaharah Ibrahim JCA:

Background Facts

[1] The appellant Karunmas Ehsan Sdn Bhd, who was the first defendant in the High Court, was the registered proprietor of that parcel of land known as Lot 6504, Mukim Kajang, Daerah Hulu Langat, Selangor ("Lot 6504") and was also the developer of a project known as Taman Desa Karunmas (the "project") being developed on Lot 6504.

[2] The appellant Siew Yaw Jen, who was the second defendant in the High Court, was one of the consulting engineers for the first defendant and was responsible for the project.

[3] Lot 6504 and the project are situated within the local authority area under the administration of the respondent, Majlis Perbandaran Kajang, which was the plaintiff in the High Court.

[4] We shall refer to the parties after this in their original respective capacity in the High Court.

[5] The first defendant had lodged the infrastructure plan for the project, known as Infrastructure Plan No. 1/P/13/97 ("infrastructure plan") and the infrastructure plan was approved by the plaintiff.

[6] According to the infrastructure plan, the first defendant was required to construct a Nehemiah Reinforced Soil Wall and Bored Pile Wall ("retaining walls") along the slope ("slope") throughout the boundary of Lot 6504 with the adjacent lot held under Lot 1758, Mukim Kajang, Daerah Hulu Langat, Selangor ("Lot 1758").

[7] The second defendant had signed a form known as "Borang Pengesahan Jurutera" dated 23 November 2000 ("PJ Form") and civil works structures had been constructed by the first defendant in accordance with the infrastructure plan.

[8] Based upon the PJ Form, the plaintiff issued a certificate of fitness for occupation ("CFO") for the project on or around 28 December 2001.

[9] Subsequent to that, soil erosion and landslides occurred on the slope. The plaintiff claimed that it found that the first defendant did not in fact build the retaining walls.

[10] The plaintiff claimed that the defendants were guilty of fraud in submitting the PJ Form when the retaining walls were not in fact built. The plaintiff also claimed, alternatively, that the defendants were guilty of negligence when they failed to build the retaining walls in accordance with the infrastructure plan.

[11] The plaintiff also claimed that it had been put to great expense as it had to carry out remedial works and had to construct temporary/emergency retaining walls along the slope when the erosion and landslides began to endanger the residents in the project, especially those living close to the slope.

[12] The plaintiff demanded through its solicitors that the first defendant carry out remedial works and build the retaining walls. The first defendant, through its solicitors, denied that it had the obligation to do so.

In The High Court

[13] The plaintiff commenced this action. The High Court allowed the plaintiff's claim against the defendants, except for the claim for exemplary and aggravated damages.

[14] The High Court ordered the defendants:

(i) To take immediate action to stabilise the slope in accordance with the infrastructure plan;

(ii) To pay the plaintiff general damages to be assessed and interest on the sum so assessed;

(iii) To pay the plaintiff special damages in the sum of RM244,394 and interest on such special damages; and

(iv) To pay costs of RM30,000.

[15] The learned High Court Judge found that:

(a) The retaining walls were not built despite being part of the infrastructure plan; and

(b) The second defendant had made false representation that could be also fraudulent and negligent misrepresentation on the PJ Form that stated the project had been completed in accordance with the infrastructure plan, and as the PJ Form was signed by the second defendant on behalf of the first defendant. The first defendant was equally liable for such misrepresentation.

The Appeal

Issues

[16] Having read and heard the submissions of the parties before us, we were of the view that there were three issues to be determined in this appeal:

(i) whether the plaintiff's action was barred by limitation;

(ii) whether the first defendant's refusal to construct the retaining walls upon demand being made by the plaintiff constituted negligence; and

(iii) whether the plaintiff was estopped from claiming the reliefs claimed in this action.

Analysis

(i) Whether The Plaintiff's Action Was Barred By Limitation

[17] The issue of limitation was not addressed at all by the learned High Court Judge in His Lordship's judgment despite the fact that:

(a) That issue was pleaded in para. 9 of the first defendant's amended defence and para. 12 of the second defendant's amended defence; and

(b) That issue was raised during submissions before the High Court.

[18] The PJ Form was signed on 23 November 2000 and the CFO was issued on 28 December 2001. It was submitted that the action was barred by limitation as the action was only commenced on 25 October 2011.

[19] The plaintiff's action arose from what it claimed to be the first defendant's negligence in not constructing the retaining walls, and the second defendant's fraudulent/negligent misrepresentation in the PJ Form that the retaining walls had been built when they had not, for which representation the first defendant was also liable. These causes of action were clearly causes of action in tort.

[20] We noted that the plaintiff was not relying on any statutory provisions as a foundation of its claims. Therefore, its claims remained claims in tort.

[21] The defence clearly stated that the plaintiff, through its representatives, had conducted site inspections on 4 April 2001 and 9 August 2001, well before the CFO was issued on 28 December 2001. There was no reply filed to the amended defence.

[22] The defendant's averments on the site inspections were borne out by the letter dated 5 April 2001 signed by Anuar bin Abdul Wahab, the then head of the plaintiff's Infrastructure and Development Department (Jabatan Infrastruktur dan Pembangunan) addressed to the plaintiff's architect at its Building Control Department (Jabatan Kawalan Bangunan). This letter mentioned that a site inspection was conducted on 4 April 2001 and the Infrastructure and Development Department supported (with an emphatic "disokong") the issuance of the CFO. Paragraph 2 of that letter states:

> 2. Berdasarkan kepada pemeriksaan di tapak cadangan, Jabatan ini berpuashati ke atas pembinaan infrastruktur dan kerja-kerja berkaitan di mana Sijil Kelayakan Menduduki adalah DISOKONG.

[23] The same Anuar sent out a letter dated 28 September 2001 addressed to Jen Jurunding (which letter was copied to the plaintiff's architect at its Building Control Department), referring to a site inspection conducted on 9 August 2001 and expressing support for the issuance of the CFO based on that site inspection, again with an emphatic "disokong":

> 3. [sic] Berdasarkan kepada pemeriksaan di tapak cadangan, Sijil Kelayakan Menduduki adalah DISOKONG

[24] The letters dated 5 April 2001 and 28 September 2001 were contained in the common bundle of documents.

[25] Anuar was not called by the plaintiff as its witness.

[26] If there had been any non-compliance with the infrastructure plan or with any other infrastructure requirements that would stand in the way of the CFO being issued, that non-compliance would surely have been obvious from the two site inspections.

[27] In any event, by the time the CFO was issued, the plaintiff should have known from the site inspections that the retaining walls had not been built.

[28] If the PJ Form had, as alleged by the plaintiff, contained a false or negligent representation that they had been built, the plaintiff would have, by the time the CFO was issued, known of that alleged misrepresentation.

[29] In other words, the cause of action had arisen by the date of the issuance of the CFO on 28 December 2001, if not earlier.

[30] Under s. 6 of the Limitation Act 1953, the period of limitation for actions founded on tort is six years. Therefore by 27 December 2007, the plaintiff's action for the defendants' alleged tortious actions/omissions would have been barred by limitation.

[31] However, the plaintiff's argument was that the cause of action for negligence was based on the refusal of the first defendant to take measures to carry out remedial works and construct the retaining walls despite

demands by the plaintiff on 15 October 2010 and 8 December 2010 through its solicitors. The period of limitation had to be calculated, according to the plaintiff, from the date of the demand in 2010.

[32] We shall deal later with the issue of whether the tort of negligence was in fact committed by this refusal.

[33] We noted that the occurrence of soil erosion and landslips had started even as early as 2001, before the CFO was issued, and meetings and remedial actions had been ordered and several actions had been taken.

[34] We were of the considered view the cause of action for the first defendant's alleged neglect in relation to the construction of the retaining walls arose in 2001, not when the letter of demand was finally issued in October 2010.

[35] We therefore agreed with the defendants that the plaintiff's claim was barred by limitation by the date of its filing on 25 October 2011.

(ii) Whether The First Defendant's Refusal To Construct The Retaining Walls Constituted The Tort Of Negligence As Against The Plaintiff

[36] The tort of negligence requires first of all that there be a duty of care on the part of the plaintiff not to do any act or omit to do any act the doing of which or the omission of which could foreseeably affect other persons resulting in damage or loss to such other persons. The tort is complete when the act is done or omitted to be done and damage or loss is caused by that act or omission. This is the essence of Lord Atkin's "neighbour" principle in the classic case of *Donoghue v. Stevenson* [1932] AC 562

[37] In the case before us, it could be argued that the first defendant owed a duty of care to the persons affected by its neglect/refusal to build the retaining walls, particularly after the erosion occurred. Those persons, quite obviously, would be the residents residing near or in the vicinity of the slope such that if the slope failed or became destabilised, they would foreseeably be adversely affected.

[38] The plaintiff's complaint however was that when the first defendant refused to take action to construct the retaining walls, the plaintiff had to take remedial actions when there was erosion on and of the slope and as a result incurred expense.

[39] We were unable to see how the first defendant's refusal to construct the retaining walls after the plaintiff demanded that it do so could form the basis of negligence.

[40] In fact, after having pleaded gross negligence in para. 13 of its amended statement of claim, the plaintiff went on to state in para. 16 of its amended statement of claim that as the local authority in which the first defendant's project was situated it had a duty to ensure the safety and protect the interest of the residents in the project "dan adalah berkewajipan untuk memulakan tindakan ini terhadap defendan-defendan bagi kepentingan awam". Is this then in fact and in law a claim founded on the tort of negligence? We did not think so.

[41] Again, we must state that we were unable to find in the pleadings and in the record of appeal any reliance on any statutory provision by the plaintiff in commencing this action against the defendants.

(iii) Whether The Plaintiff Was Estopped From Claiming The Reliefs Claimed In This Action

[42] As we have mentioned above, prior to the issuance of the CFO, at least two inspections were conducted by the plaintiff on the project.

[43] At the time of the inspections, it would have been obvious to the plaintiff's agents performing the inspections that the first defendant had built an earth slope which, according to the second defendant in his witness statement, consisted of "close turf surface inclusive of berm and cascading drain". The earth slope certainly was not the retaining walls indicated on the infrastructure plan.

[44] Unfortunately, on this issue the learned High Court Judge only had this to say:

> 23. The Defendants also argue waiver on the part of the Plaintiff. To my mind if there had been a waiver it was a conditional waiver which was conditional upon no further erosion or landslides, taking place.

[45] There was no evidence that the CFO that was granted was a conditional CFO.

[46] When an earth slope was built and CFO granted after two inspections, the plaintiff clearly accepted that the earth slope was an acceptable replacement for the retaining walls.

[47] When the second defendant was cross-examined on the earth slope having been constructed instead of the retaining walls, the following was the extent of that cross-examination:

> YCT: Mr. Siew, in your Witness Statement, you also had mentioned that earth slope had been constructed.
>
> SIEW: Yes.

YCT: So my question to you now is in the event that the earth slope that had been constructed is properly maintained and a proper drainage system is implemented on Lot 1758, do you as a consulting engineer hold the view and opinion that the intended retaining wall is not necessary at all?

SIEW: Yes, it is not.

[48] In other words, the second defendant's opinion that the retaining walls would not have been necessary if Lot 1758 (situated on higher ground than Lot 6504) had a proper drainage system and the earth slope was properly maintained was not challenged.

[49] The sufficiency of that earth slope was clearly the basis for its acceptance by the plaintiff and the subsequent issuance of the CFO.

[50] On the maintenance of the earth slope, the second defendant said, in his witness statement:

Q: Can that earth slope then prevent landslides?

A: Yes, if it is maintained properly. However, it was not maintained properly in particular on the other side located in Lot 1758 by the owner of the neighbouring lot.

Q: Can you please explain what do you mean by that?

A: Upon inspection, I found out that the said drain was not maintained properly with slit [sic] and grass growing along the said drain and it was clogged with earth and stones which caused overflow of rain water and landslides.

[51] The second defendant was not cross-examined by the plaintiff's counsel on this part of his witness statement. He was however, cross-examined by counsel for the first defendant.

[52] During cross-examination by counsel for the first defendant, the second defendant was asked if there was any proper drainage system implemented on Lot 1758. The second defendant's answer was "No, there isn't". The following question and answer were then recorded:

YCT: There isn't. So as a consulting engineer, do you hold your opinion that the flow of the surface water or rather the uncontrolled, the flow of the uncontrolled surface water [sic] from Lot 1758 down to the slope would increase the risk and cause landslip on the slope?

SIEW: Yes, it will.

[53] It was the first defendant's position that it was within the authority of the plaintiff to ensure that the owner of Lot 1758 take the necessary steps to prevent the flow of water and mud down the slope to the site of the project.

[54] Mr Leong, the then Senior Project Manager of Mayland Group of which the first defendant was a part, stated as follows in his witness statement (reproduced as in the witness statement):

Q17. Are you familiar with the general topography or the condition of the Lot 6504 and 1758?

A17. Yes. The boundary of Lot 6504 and 1758 is a slope with Lot 1758 situated at the higher ground if compared with Lot 6504. Lot 6504 is developed into housing and commercial development whereas Lot 1758 is bare and exposed land with hardly any vegetation.

Q18. Was the development project on Lot 1758 [sic] affected by the condition of Lot 1758 which was bare and exposed and situated on higher part of the slope?

A18. From the project file that I have access, I came to know that the state and condition of Lot 1758 had caused soil erosion and the mud or silt and water from Lot 1758 flowed down and was deposited onto Lot 6504.

Q19. What action did the 1st Defendant take in view of the mud or silt flowing from Lot 1758 and deposited onto Lot 6504?

A19. From the project file that I have access, I gathered that discussion and meeting had been held between the representatives of the First Defendant and the owner of Lot 1758 (ie Hill village Sdn Bhd) wherein Hill village Sdn Bhd had agreed to take preventive measures to control and channel away mud or silt and water on Lot 1758 and 5733 and prevent them from flowing onto Lot 6504. Hill Village also agreed to maintain the existing earth drains on its land to ensure that the drains were not clogged at all time. The discussion and the agreement of Hill Village were all recorded in the 1st Defendant's letter dated 21.11.2001 which was addressed to Hill Village Sdn Bhd. The said letter can be found at page 18 of common bundle.

Q20. At all material time was the Plaintiff aware that the condition of the Lot 1758 and the inaction of the owner of Lot 1758 had caused soil erosion and depositing mud or silt and water onto Lot 6504?

A20. Yes. The Plaintiff was fully aware. In fact the letter dated 21.11.2001 was copied to the Plaintiff and the state assembly man for that constituency.

Q21. Do you know whether Hill Village Sdn Bhd had taken measures to prevent or minimise soil erosion and control and channel away the mud or silt and water to prevent them from flowing and depositing onto Lot 6504?

A21. From the project file that I have access, I gathered that Hill Village Sdn Bhd had failed to take any adequate measures to address the problem.

[55] During cross-examination, there was no question posed to Mr. Leong which was directly related to the evidence set out above. The only question posed was in relation to the flood along Jalan Karunmas 3. It was put to Mr. Leong by the plaintiff's counsel that the flood was caused by the non-construction of the retaining walls. Mr. Leong disagreed.

[56] The CFO was issued on 28 December 2001. The letter referred to in Answer 20 was copied to the plaintiff. That letter was dated 21 November 2001, almost a month before the issuance of the CFO.

[57] The plaintiff must have been satisfied that it could deal with the issue of the surface run-off coming down the slope from Lot 1758. Hence its willingness to issue the CFO on 28 December 2001.

[58] We were unable to find any basis that could support the learned trial judge's dismissal of the first defendant's claim that the plaintiff had waived the requirement for the construction of the retaining walls and had accepted, instead, the earth slope as being an adequate alternative.

[59] It must be borne in mind that the plaintiff's own witness, Puan Fadilah binti Razali (SP1) admitted that in order to construct the retaining walls, the top of the slope on Lot 1758 had to be cut off. She was then asked:

DPL Ya. Ok. Then siapakah yang seharusnya memotong tanah di bahagian atas cerun di Lot 1758 itu?

FADILAH Di atas Lot 1758?

DPL Yes.

FADILAH: Pemilik Lot 1758.

DPL Pemilik Lot 1758. So bolehkah Defendan Pertama memasuki Lot 1758 untuk memotong tanah tersebut tanpa kebenaran pemilik Lot 1758? Boleh?

FADILAH Tidak boleh.

[60] SP1 was later asked:

DPL Tetapi, Puan Fadilah, Majlis Perbandaran Kajang boleh mengarahkan pemilik Lot 1758 untuk memberi kebenaran tersebut kepada Defendan Pertama untuk memasuki tanah dan memotong cerun tanah. Bolehkah Majlis Perbandaran Kajang memberikan arahan sedemikian sebagai pihak berkuasa tempatan? Boleh atau tidak?

FADILAH Arahan?

DPL Yes.

FADILAH Tidak boleh.

[61] The plaintiff clearly knew that the retaining walls could only be built if the top of the slope on Lot 1758 was cut off. This was not possible unless the owner of that lot consented. The possibility of compulsorily acquiring that part of the slope to enable the retaining walls to be built did not appear to have been considered.

[62] There was ample evidence before the High Court to show that the plaintiff knew the constraints faced by the first defendant in relation to the construction of the retaining walls and accepted that an earth slope was an adequate alternative, and hence proceeded to grant the CFO.

[63] The plaintiff was clearly therefore estopped from now claiming the reliefs claimed in this action.

Decision

[64] We therefore allowed the appeals by both defendants. We fixed costs at RM15,000 here and below to each defendant and ordered the deposit to be refunded to the respective appellant.